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No. 92-1911

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

**PUD No. 1 OF JEFFERSON COUNTY
AND THE CITY OF TACOMA,**
v. *Petitioners,*

**STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
DEPARTMENT OF FISHERIES AND
DEPARTMENT OF WILDLIFE,**
Respondents.

**On Petition for a Writ of Certiorari to the
Supreme Court of the State of Washington**

**BRIEF OF AMICUS CURIAE
NORTHWEST HYDROELECTRIC ASSOCIATION
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Does § 401 of the Clean Water Act grant the states authority to condition a water quality certificate for a hydroelectric project on minimum flows to protect fish habitat in excess of the flows necessary to meet adopted water quality standards.

(i)

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INTEREST OF AMICUS CURIAE**THE AMICUS**

The Northwest Hydroelectric Association (NWHA) submits this brief Amicus Curiae. NWHA is the trade association of the Pacific Northwest hydroelectric industry. Its members include publicly owned and investor owned utilities, municipalities and independent power producers located in Idaho, Montana, Northern California, Oregon and Washington.

SUMMARY OF THE ARGUMENT

In its order granting Tacoma's water quality certification request, the Washington Department of Ecology imposed minimum flow requirements based on its purported authority under § 401(d)¹ of the Clean Water Act to condition water quality certificates on the water quality factors specified in § 401(d) and "any other appropriate requirement of state law." This order conflicts with the FERC's exclusive authority to regulate hydroelectric projects.

The Washington Supreme Court upheld the conditions imposed by the Washington Department of Ecology in the Tacoma license. The Court's decision incorrectly concludes that § 401 grants the State of Washington the authority to impose minimum stream flow conditions to protect fish habitat. The Washington Supreme Court's decision contradicts the express provisions of the Clean Water Act, the balance of authority in the federal licensing scheme created by Congress and this Court's opinions interpreting that licensing scheme.

The Washington Supreme Court's opinion will cause disruption in the FERC licensing process. If allowed to stand, the opinion will permit an unauthorized state veto power by imposing minimum flow standards which render the projects uneconomical. Further, the opinion contributes to the uncertainty surrounding the definition of the scope of state authority under § 401 of the Clean Water Act.

FERC refuses to review the validity of water quality certifications issued pursuant to § 401 of the Clean Water Act, and licensees therefore cannot expect clarification from any federal agency. In the absence of direction from the United States Supreme Court, the scope of state authority to condition a § 401 certification will remain in

¹ The Clean Water Act is codified at 33 U.S.C. § 1251 *et seq.*, (1988).

question. This case presents an issue of national importance to the hydropower industry in the Pacific Northwest.

ARGUMENT

I. THIS CASE PRESENTS AN ISSUE OF REGIONAL IMPORTANCE TO THE PACIFIC NORTHWEST HYDROPOWER INDUSTRY.

A. The Pacific Northwest Hydropower Industry.

The Northwest Hydroelectric Association membership represents numerous entities that have a significant interest in this petition for certification.² The Pacific Northwest is a largely hydrobased system. Hydropower generates two-thirds of the region's energy and makes up three quarters of the region's generating capacity. The hydropower industry provides more of the region's electricity than all other sources of power combined.

Hydropower will continue to develop and remain the primary regional source of electricity. The Northwest Conservation and Power Planning Counsel 1991 plan calls for continued development of hydropower in the Northwest. Indeed, the region's new hydropower potential is substantial. The highest potential for new hydropower projects in the Pacific Northwest is approximately 2,300 megawatts of hydropower capacity, which produces 1,100 megawatts of average energy and 900 megawatts of firm energy at 13.4 cents per kilowatt-hour.³

Other factors assure hydropower's continuing importance to the Northwest. The low operating and maintenance costs of hydroelectric power projects cause hydropower to be among the lowest cost sources of electricity

² See the membership list in the attached Appendix.

³ Northwest Power Planning Council, 1991 *Northwest Conservation and Electric Power Plan*, "Generating Resources," Volume II, Part II (1991).

in the country.⁴ From an environmental perspective, hydroelectric generation is a clean, renewable source of energy. Additionally, hydroelectric projects accomplish more than simply the production of electricity. Such projects provide recreational opportunities to visitors and benefits to fish and wildlife. Some projects enhance flood control, navigation, irrigation and domestic water supplies in addition to their primary purpose of generating power. As a result of these benefits, hydropower has become an integral part of a majority of the Northwest's communities, businesses and industries. In order to maintain the viability of hydropower as the traditional major resource for electrical energy in the Pacific Northwest, it is essential that the FERC licensing process be definitive and comprehensive.

B. The Hydropower Industry Will Be Significantly Affected If States Are Able To Impose Minimum Flow Conditions For Fish Habitat.

If states are allowed to mandate minimum flows for non-water quality conditions, such as fish habitat, despite the balancing assessments made by FERC, the effect on the hydroelectric industry will be severe. An increase in minimum flows at a hydroelectric project results in the release of stored water at a time when it is uneconomical to produce energy. With respect to run-of-river projects (i.e. those with no water storage capability), the increased minimum flows result in a loss of water for power generation. A special attribute of hydropower is the ability to generate at the moment when power is needed. This ability is lost when water is released from storage before peak demand periods. To replace that lost generation, electric suppliers rely on more costly forms of production. Combustion turbines, which produce air emissions, are the most common alternate energy source.

⁴ National Hydropower Association, *Hydroguide: Hydroelectric Resources of the United States*, "Introduction" (NHA, Washington, D.C. 1989).

FERC's job is to balance these competing values. FERC's decision is final and must be so if developers are to have the certainty needed for financing. Section 401 is not about balancing, but applying approved standards to protect water uses from pollution.

1. *A recognition of state authority to set minimum flows for non-water quality conditions will disrupt the FERC licensing process.*

State exercise of undelegated authority under the guise of the Clean Water Act will disrupt the FERC licensing process. If states can set minimum flows for fish habitat and other non-water quality conditions, disputes over § 401 conditions will result in substantial delays in the licensing process. Such delays will increase costs and create an uncertain regulatory environment.

A recent Ninth Circuit case involved a hydro licensee that had been refused a hearing on its state water rights application. The licensee was not willing to undertake additional studies regarding concerns which had already been addressed by FERC. Following this Court's decisions in *California v. FERC*, 495 U.S. 490 (1990), and *First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n*, 328 U.S. 152 (1946), the Ninth Circuit stated:

The hardship is the process itself. Process costs money. If a federal licensee must spend years attempting to satisfy an elaborate, shifting array of state procedural requirements, then he must borrow a fortune to pay lawyers, economists, accountants, archaeologists, historians, engineers, recreational consultants, environmental consultants, biologists and others, with no revenue, no near-term prospect of revenue, and no certainty that there ever will be revenue. Meanwhile, politics, laws, interest rates, construction costs, and costs of alternatives change.

Sayles Hydro Ass'n v. Maughan, 985 F.2d 451, 453 (9th Cir. 1993). State imposed non-water quality standards

will present the procedural consequences that the Ninth Circuit envisioned.

2. State imposed non-water quality conditions result in unauthorized veto power.

A state's power to impose non-water quality conditions such as minimum flows for fish habitat is equivalent to a veto power. For example, in the instant case, the state imposed conditions make the proposed hydroelectric power project economically unjustifiable. As a result, FERC would be unable to license the Project under the comprehensive development standard of § 10(a) of the Federal Power Act. In light of the significant policy considerations inherent in the Federal Power Act, it is improper to give state water resource agencies such veto authority. The costs required to meet the state conditions are much greater than the expense of meeting the FERC conditions. The state imposed conditions could result in a veto of a proposed project.

Indeed, this court has recently recognized that permitting the states to exercise veto authority over non-federal hydroelectric development improperly disturbs the Commission's comprehensive regulatory authority. In *California v. FERC*, 495 U.S. 490 (1990), this Court reaffirmed that the Federal Power Act preempts state authority to set minimum flow requirements for Commission licensed hydroelectric projects. The Court reasoned that "allowing California to impose the challenged requirements would be contrary to congressional intent regarding the Commission's licensing authority and would constitute a veto of the project that was approved and licensed by FERC." *Id.* at 506-7. In the face of *California v. FERC*, we now see the State of Washington trying to reach the same result via § 401 of the Clean Water Act. The principle against a state imposed veto remains the same.

II. UNLESS ADDRESSED BY THIS COURT THE WASHINGTON SUPREME COURT'S DECISION CREATES UNCERTAINTY AS TO THE STATE AUTHORITY GRANTED UNDER § 401 OF THE CLEAN WATER ACT AND WILL DISRUPT THE HYDROELECTRIC LICENSING PROCESS.

A. The Washington Supreme Court's Decision Misinterprets State Authority Under § 401 Of The Clean Water Act.

According to the Washington Supreme Court's interpretation of § 401(d), a state may impose any condition on a license as long as the condition is water quality related. By this definition, the Washington Department of Ecology has authority to take actions, such as specifying minimum stream flows to protect fish habitat, which directly conflict with the authority granted FERC under the Federal Power Act.

Congress did not intend for § 401(d) to have such expansive application. Rather, in allowing states to condition water quality certificates pursuant to § 401(d), Congress provided the states with specific authority to establish water quality standards designed to protect particular identified beneficial uses from discharges or other activities which add pollutants or degrade the receiving waters. In contrast, FERC is charged with balancing all competing interests in deciding whether a project is in the public interest. *California v. FERC*, 495 U.S. 490 (1990).

The Supreme Court of Washington's interpretation of § 401(d) greatly exceeds the narrow state role prescribed by Congress and consequently disturbs the balance of authority which Congress established in its federal licensing scheme.

1. The Washington Supreme Court's Opinion Fails to Recognize FERC's Exclusive Authority.

This Court has recognized a pervasive federal hydroelectric licensing scheme which preempts conflicting state action. In *First Iowa Hydro-Elec. Coop. v. Federal Power*

Comm'n, 328 U.S. 152 (1946), the Court rejected the State of Iowa's efforts to impose a state permitting requirement on a licensee which was attempting to obtain a hydroelectric license from the Federal Power Commission. The Court concluded that allowing the state to impose a permitting requirement would in effect grant the state veto power over the license and thereby subvert Congress' intention to concentrate comprehensive hydropower planning authority in the FPC. *First Iowa*, 328 U.S. at 164.

In *California v. FERC*, 495 U.S. 490 (1990), the Court considered the State of California's authority to impose minimum flow requirements to protect fisheries. California argued that § 27 of the Federal Power Act, which reserves certain authority regarding proprietary water rights to the states, provided the state with authority to impose mandatory flow requirements on a licensee. The Court rejected this argument and unanimously held that the flow requirements mandated by California were preempted by the federal licensing scheme. In making this determination, the Court specifically recognized that the addition of § 10(j) to the FPA reaffirmed "*First Iowa*'s understanding that the FPA establishes a broad and paramount regulatory role" in the area of fish and wildlife license conditions. See *California v. FERC*, 495 U.S. at 499.

Pursuant to § 10(j) of the FPA, FERC is required to include fish and wildlife conditions in hydroelectric licenses based mainly on the recommendations of state fish and wildlife agencies. While § 10(j) requires FERC to give the recommendations of state fish and wildlife agencies special deference in establishing fish and wildlife conditions in the license, FERC possesses the authority to reject the states' recommendations when its finds that such recommendations are inconsistent with the purposes and requirements of Part I of the Federal Power Act. 16 U.S.C. § 803(j)(2). Under the Washington opinion, the state can engage in regulatory activity that is outside its

narrow authority. § 401 does not allow states to define non-water quality minimum flow requirements.

2. *The Washington Department of Ecology Exceeded Narrow Authority to Limit Discharge of Pollutants.*

In 1972 the Clean Water Act granted the states narrow authority for the purpose of regulating the discharge of pollutants into the Nation's waters.⁵ In the Clean Water Act, Congress empowered the Environmental Protection Agency ("EPA") with authority to limit the discharge of pollutants through a permitting process and by developing water quality standards which are applied to determine the specified levels of discharge in the permit.

Pursuant to the Clean Water Act, states can assume responsibility for developing these water quality standards subject to the approval of EPA. Specifically, § 401 grants states the circumscribed authority to certify that applicants for a federal license comply with the state's criteria concerning the discharge of pollutants developed as part of the state's water quality standards. The Clean Water Act further provides that the state may condition water quality certificates on the effluent limitations, water quality standards and monitoring provisions specified in § 401(d), as well as other appropriate requirements of state law.

The Washington Department of Ecology exceeded its authority under the Clean Water Act by imposing stream flow conditions for fisheries. Water quality standards concern the discharge of pollutants. Specifically, Washington's published water quality standards pertain to such things as fecal coliform, dissolved oxygen, dissolved gases,

⁵ The term "pollutant" is defined as specific materials including, among other things, dredged soil, solid waste, chemical wastes, biological materials and radioactive materials. 33 U.S.C. § 1362(6). Pursuant to the Act, the discharge of a pollutant "is any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12).

and other micro characteristics. The State of Washington did not limit its action to a determination of the levels of discharge of pollutants from the dam that would comply with water quality standards. Therefore, the state exceeded the limited authority which Congress granted it under § 401.

B. The Washington Decision Regarding The Scope Of State Authority Under § 401 Contributes To National Confusion Which Requires This Court's Direction.

State courts have produced divergent decisions interpreting the scope of state authority under § 401 to condition certifications. For example, the Vermont Supreme Court has determined that it is proper for its state agency to regulate aesthetic flows under § 401.⁶ In Connecticut, however, minimum spill requirements based on subjective aesthetic impact are beyond the scope of the state agencies.⁷ Courts in Montana⁸ and Maine⁹ have upheld mandatory § 401 conditions regarding fish passages and habitat. By contrast, in Pennsylvania and New York,¹⁰ courts have found that such conditioning is beyond the scope of authority provided to states under § 401. In Oregon, it

⁶ See *Simpson Paper (Vermont) Co. v. Department of Envtl. Conservation*, petition for cert. filed, 61 U.S.L.W. 3504 (U.S. Dec. 12, 1992) (No. 92-1012).

⁷ See *Summit Hydropower v. Commissioner of Envtl. Protection*, No. CV91-050-26-43, 1992 Conn. Super. LEXIS 2177, 1992 WL 175241, (Conn. Super. July 20, 1992), Supreme Court of Connecticut Nos. SC14618 and 14619, argued May 4, 1993.

⁸ See *Hi-Line Sportsmen Club v. Milk River Irrigation Dist.*, 241 Mont. 182, 786 P.2d 13 (Mont. 1990).

⁹ See *Bangor Hydro-Elec. Co. v. Board of Environmental Protection*, 595 A.2d 438, 440 (Me. 1991).

¹⁰ See *Nigara Mohawk Power Corp. v. New York State Dept. of Envtl. Conservation*, 187 A.D.2d 7, 592 N.Y.S.2d 141 (N.Y. App. Div. 1993), motion for leave to appeal granted, N.Y. Ct. of App., May 11, 1993.

has been held that compliance with state land use laws is not sufficiently water quality related to be included in § 401 review.¹¹

Each state court decision complicates the body of law with which an applicant for a federal hydroelectric project license must comply. The licensing process is becoming increasingly unpredictable. As this Court has explained:

"to require the industry to proceed without knowing whether the [state regulation] is valid would impose a palpable and considerable hardship on the utilities."
...

Pacific Gas & Electric Co. v. State Energy Resources Cons. & Dev. Com'n., 461 U.S. 190, 201-202 (1983). The differing state interpretations have created the current confusion. This confusion requires the Court to examine this issue.

C. This Court Is The Only Forum To Resolve The Conflict Regarding The Scope Of State Authority Under §401.

FERC has taken the position that it lacks the authority to review conditions contained in state certifications. See *Town of Summerville*, 60 FERC ¶ 61,291 at 61,990 (1992) ("since pursuant to § 401(d) of the Clean Water Act all of the conditions in the water quality certification must become conditions in the license, review of the appropriateness of the conditions is within the purview of state courts and not the Commission"); *Noah Corporation*, 57 FERC ¶ 61,170 at 61,601 (1991) ("we recognize that review of the appropriateness of water quality certification conditions is a matter for state courts to decide"); *Central Maine Power Co.*, 52 FERC ¶ 61,033 at 61,172 (1990) ("review of the appropriateness of water quality certification conditions is the purview of the state courts").

¹¹ *Arnold Irrigation District v. Department of Environmental Quality*, 79 Or. App. 136, 717 P.2d 1274 (1986).

In *Central Maine*, 52 FERC at 61,172, FERC noted that although several of the conditions imposed by the state were unrelated to water quality, FERC was nevertheless bound by § 401 to include the conditions. FERC's position appears to require that a state water quality certification be automatically included in any license issued by FERC. The consequence of this position is that states are free to impose minimum flows or other conditions in § 401 certifications, regardless of whether such conditions are indeed related to water quality standards.

Until this Court provides guidance, "a dual final authority, with a duplicative system of state permits and federal licenses required for each project, [is] unworkable." *First Iowa*, 328 U.S. at 169. This Court should therefore grant certiorari and clarify the authority granted the states under § 401 of the Clean Water Act with the comprehensive federal licensing scheme established by Congress.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Name	City	State
ABB Phoenix Controls	Bothell	WA
Alaska Power & Telephone	Port Townsend	WA
Central Oregon I.D.	Redmond	OR
Chelan PUD	Wenatchee	WA
Chelan PUD	Wenatchee	WA
CHI West, Inc.	Boise	ID
City of Tacoma/Utility	Tacoma	WA
Consolidated Hydro, Inc.	Grenich Plaza	CT
Consolidated Pumped Stor.	Greenwich	CT
David Evans and Associates	Portland	OR
Davis Wright Tremaine	Portland	OR
Deschutes Valley Water Dist.	Madras	OR
Douglas County PUD	E. Wenatchee	WA
EBASCO Services, Inc.	Bellevue	WA
EDAW	San Francisco	CA
EG&G Idaho, Inc.	Idaho Falls	ID
Falls Creek HB Limited P.	Eugene	OR
Grant County PUD	Ephrata	WA
Harza Northwest, Inc.	Bellevue	WA
HCI Publications	Kansas City	MO
HDR Engineering, Inc.	Bellevue	WA
Hydro West Group, INC.	Bellevue	WA
Hydro Y.E.S.	Ferndale	WA
Ida-West Energy	Boise	ID
Impsa International, Inc.	Pittsburgh	PA
Kvaeme-Hydro Power, Inc.	Stamford	CT
Lilliwaup Falls Generating Co.	Seattle	WA
Middle Fork Irrigation Dist.	Parkdale	OR
National Hydro	Boston	MA
Northrop Devine & Tarbell, Inc.	Portland	ME
NW Pipe & Casing Co.	Portland	OR
NW Power Planning Council	Portland	OR
Okanogan County PUD	Okanogan	WA
Pacific Hydro Consulting Group	Alameda	CA
Pacific Water Works Supply	Seattle	WA
PaciCorp	Portland	OR
Pend Oreille County PUD	Newport	WA
Portland General Electric	Portland	OR

Name	City	State
Precision Machine & Supply	Lewiston	ID
Puget Power	Bellevue	WA
Puget Power	Bellevue	WA
R W Beck & Associates	Seattle	WA
Ray Toney & Assoc.	Redding	CA
Resource Management	Portland	OR
Santiam Water Control Dist.	Aumsville	OR
Shannon & Wilson, Inc.	Seattle	WA
Siemens Power Corporation	Wes Allis	WI
Sithe Energies USA, Inc.	New York	NY
Snohomish County PUD	Everett	WA
STS HydroPower, Ltd.	Issaquah	WA
STS HydroPower, Ltd.	Sacramento	CA
TetraGenics	Butte	MT
Van Ness, Feldman & Curtis	Seattle	WA
Van Ness, Feldman & Curtis	Washington	DC
Warm Springs Power Ent.	Warm Springs	OR
Washington Water Power Co.	Spokane	WA